United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1246

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 1246

DONALD EUCKER, :

Defendant-Appellant. :

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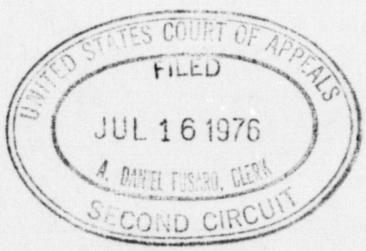
PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING IN BANC



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STATEMENT

Appellant Donald Eucker moves, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure for a rehearing and reconsideration of this Court's order and opinion dated July 2, 1976 (United States v. Eucker, et al., slip op. 4737), affirming the judgment of conviction entered against him on June 16, 1975, in the United States District Court for the Southern District of New York. Additionally, Eucker suggests, pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, that the rehearing be held in banc.

This case merits reconsideration by this Court because: (1) the decision of July 2, 1976 leaves unresolved

the principal issue originally preserved for and raised on appeal--whether the accusation to which Eucker pleaded guilty was sufficient to charge a violation of law; and, (2) the effect of the decision is to create a conflict with prior controlling authority of this Circuit.

As is clear from the opinions of the Court in this case and from the record on appeal, Donald Eucker pleaded guilty to Count 9 of Indictment 74 Cr. 859 but claimed that the count failed to charge a crime. Specifically, he contended that Count 9 of the indictment failed to charge a violation of Title 15, United States Code, Section 78h(c), subsection 3. In its opinion of March 8, 1976 this Court remanded the case to the District Court for a determination of whether at the time Eucker pleaded guilty he was aware of the possible applicability of other statutes, including 15 U.S.C. §78h(c), subsection (1) belatedly claimed by the government to be charged by Count 9. This Court did not rule on the question of whether the indictment properly charged a violation of 15 U.S.C. §78h(c), subsection (1).

On remand, Judge Knapp found that the facts admitted by Eucker at the time of his plea necessarily involved a violation of subsection (1) and thus denied Eucker's application to withdraw his guilty plea on the ground that it was made without an understanding of the nature of the charge

against him. In its subsequent opinion on July 2, 1976, this Court concluded that Judge Knapp's finding was "not clearly erroneous" and thus that he had not erred in refusing Eucker's request to withdraw his plea of guilty.

Thus, although Eucker's conviction of violating 15 U.S.C. §78h(c)(1) has now been affirmed, neither Judge Knapp nor this Court has ruled on the question of whether the indictment properly charges a violation of 15 U.S.C. §78h(c)(1).

ARGUMENT

EUCKER'S JUDGMENT OF CONVICTION MUST BE REVERSED BECAUSE THE INDICTMENT FAILS TO CHARGE A VIOLATION OF THE STATUTE ON WHICH THE JUDGMENT IS BASED

Under the judgment affirmed by this Court on July 2, 1976 Donald Eucker stands convicted of having violated subsection (1) of Title 15, United States Code, Section 78h(c). United States v. Eucker, et al., Slip op. 4737, 4739. That statute makes it unlawful for a broker, in contravention of the rules and regulations of the SEC, to hypothecate any customer's securities

> "under circumstances that will permit the commingling of his securities without his written consent with the securities of any other customer."

The accusation of which Eucker stands convicted (Count 9 of the Indictment 74 Cr. 859) charged that he

> "unlawfully, wilfully and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to $7,000,000.00. (Title 15, United States Code, Sections 78h and 78ff and 17 C.F.R. Sections 240.8c-1; Title 18, United States Code, Section 2.)"

The indictment thus fails to charge two elements of the crime: that the hypothecation said to constitute criminal conduct was made under circumstances which permitted the commingling of a customer's securities with the securities of another customer, and that such hypothecation was made without the written consent of the customer.

The failure of an indictment to allege an essential element of the crime is a fatal defect requiring dismissal of the indictment. Russell v. United States, 369 U.S. 749, 768 n. 15, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962); United States v. Cruikshank, 92 U.S. 542, 558, 23 L. Ed. 588 (1875); United States v. Berlin, 472 F. 2d 1002, 1007 (2d Cir.), cert. denied, 412 U.S. 949 (1973); United States v. Seeger, 303 F. 2d 478 (2d Cir. 1962); United States v. Wabaunsee, 528 F. 2d 1, 3-4 (7th Cir. 1975); United States v. Bates, 468 F. 2d 1252, 1255 (5th Cir. 1972); United States v. Roberts, 465 F. 2d 1373, 1375 (6th Cir. 1972); Bryant v. United States, 462 F. 2d 433, 434 (8th Cir. 1972); United States v. Tyndall, 400 F. Supp. 949 (D. Neb. 1975); United States v. Farinas, 299 F. Supp. 852 (S.D.N.Y. 1969).

As this Court stated in United States v. Seeger, supra,

> "[I]t has long been recognized that 'every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment. . .'

U.S. v. Cook, 17 Wall. 168, 174,
21 L. Ed. 538 (1872)."

It is not unlawful for a broker to hypothecate his customer's securities under all circumstances. Thus, the manner in which it is claimed that the hypothecation was unlawful must be specifically alleged in the indictment. As the District Court observed in United States v. Farinas, supra, in dismissing an indictment charging a refusal "to obey orders" of an armed forces representative at a military induction center:

> "[W]here an indictment condemns an act belonging to a species of conduct, which species includes other acts not amounting to indictable offenses, it is not sufficient that the indictment merely identifies the species in general but, rather, it must particularize the act or acts which, it is alleged, constitute the offense charged, Mims v. United States, 332 F. 2d 944, 946 (10th Cir.), cert. denied, 379 U.S. 888, 85 S. Ct. 158, 13 L. Ed. 2d 92 (1964), so that the court can be assured that the indictment charges conduct which is, in fact, prohibited by law." (Citations omitted.)
>
> * * *
>
> "In the present case, inasmuch as this Court can conceive of certain orders, unrelated to the induction process, which a civilian would not under law be necessarily required to follow, it would seem fundamental that the indictment recite the particular order or orders which the accused is alleged to have disobeyed." (Emphasis supplied.) (299 F. Supp. at 854.)

Similarly, the recitation contained in the indictment against Eucker does not describe acts which necessarily violate 15 U.S.C. §78h(c)(1). The allegation that fully paid for customers' securities were hypothecated "under circumstances that permitted such securities to be. . . subjected to liens and claims of pledges in amounts up to $7,000,000.00" totally fails to allege, demonstrate, or necessarily imply that commingling would or did occur and totally fails to allege, demonstrate or necessarily imply an absence of customer consent. On its face the indictment describes conduct which does not fall within the prohibitions of 15 U.S.C. §78h(c)(1).

In United States v. Berlin, supra, this Court reversed a conviction under a count of an indictment charging that the defendant "aided, abetted, counseled and caused. . . (another person). . . to submit to the Federal Housing Administration. . . a 'false' application for mortgage insurance." The indictment failed to allege that the defendant knew of the falsity of statments submitted. In reversing the conviction the Court quoted the language of Chief Judge Clark in United States v. Lamont, 236 F. 2d 312, 315 (2d Cir. 1956):

> "It is of course the function of an indictment to set forth without unnecessary embroidery the essential facts constituting the offense and thus accurately acquaint the defendant with the specific crime with which he is charged. But an allegation for lack of

> which the prosecution must evidently and as a matter of law fail cannot be regarded as superfluous." 472 F. 2d at 1007.

In Berlin, this Court also made clear that a statutory citation in an indictment cannot cure a failure to allege an essential element of the crime.

> "[The] deficiency was not cured by the fact that each count cited the statute that appellant is alleged to have violated. Although the statutes in question explicitly require knowledge of the falsity, if this were enough to cure a deficient statement, then almost no indictment would be vulnerable to attack; for it is a common practice in indictments to cite the statute that is alleged to have been violated." 472 F. 2d at 1008.

Thus this Court's observation in its opinion of March 8, 1976 that "the statutory reference in the indictment obviously includes all three subsections of §78h(c)" (United States v. Eucker, slip op. at 2471) was not and could not be a finding that the reference cured any failure to allege essential elements of the crime defined by subsection (1).

Finally, any factual statements made by the defendant at the time of his plea or at the hearing held by Judge Knapp on remand are irrelevant to the question of whether the indictment is legally sufficient to charge a violation of 15 U.S.C. §78h(c)(1). Similarly irrelevant are factual assertions by the government as to common practices in the

securities industry and references to the trial record of Eucker's co-defendants. A defective indictment cannot be cured by proof. United States v. Huff, 512 F. 2d 67, 69 (5th Cir. 1975).

In Huff the defendant was indicted on two counts of possession and distribution of a controlled substance. The first count charged distribution of "3,4 methylenedioxy amphetamine," which was a controlled substance. The second count charged possession of "methylenedioxy amphetamine," which was a different drug not on the list of controlled substances. The trial court instructed the jury to read the substance in Count II as that in Count I. On appeal, the conviction on the second count was reversed on the ground that it failed to allege a crime, notwithstanding the proof at trial. The Court wrote:

> "The challenged count alleges nothing more than an act which is legal. . . such a failure to allege a crime cannot be remedied by proof* * *." 512 F. 2d at 69.

CONCLUSION

Eucker's petition for a rehearing and a rehearing in banc should be granted; the judgment of conviction should be reversed and indictment dismissed.

Respectfully,

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July 16, 1976